TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 40

TERRITORY OF ALASKA, PETITIONER,

vs.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, McNEILL & LIBBY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 4, 1958
CERTIORARI GRANTED APRIL 7, 1958

No. 15070

United States
Court of Appeals
For the Ninth Circuit

TERRITORY OF ALASKA,

Appellant,

vs.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, McNEILL & LIBBY, INC., NAKAT PACKING COMPANY, NEW ENGLAND FISH CO., P. E. HARRIS COMPANY, INC., PACIFIC & ARCTIC RAILWAY & NAVIGATION CO., and OCEANIC FISHERIES CO.,

Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-4-56

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

	Original	Print
Proceedings in the U.S.C.A. for the Ninth Circuit	77	77
Minute entry of argument and submission (omitted in printing)	77	77
Minute entry of order directing filing of opinions and filing and recording of judgment	78	77
Opinion, Lemmon, J.	79	77
Dissenting opinion, Healy, J.	91	89
Judgment	93	92
Petition for rehearing	94	92
Minute entry of order denying petition for rehearing	97	94
Clerk's certificate (omitted in printing)	98	94
Order allowing certiorari	99	95

COUNSEL OF RECORD

For Appellant:

J. GERALD WILLIAMS,
Territorial Attorney General;

HENRY J. CAMAROT,
Assistant Attorney General;

EDWARD A. MERDES,
Assistant Attorney General;
Box 2170 Juneau, Alaska.

For Appellees:

H. L. FAULKNER,
350 Mills Tower,
San Francisco 4, California;

FAULKNER, BANFIELD & BOOCHEVER,
Box 1121 Juneau, Alaska;

W. C. ARNOLD,
200 Colman Building,
Seattle 4, Washington;
In Causes Numbered:
7278-A, 7279-A, 7300-A and 7302-A

R. E. ROBERTSON,
Box 1211—Juneau, Alaska.
In Causes Numbered:
7280-A, 7281-A, 7301-A and 7303-A

In the United States District Court for the District of Alaska, Division Number One, at Juneau

Civil Action No. 7278-a

TERRITORY OF ALASKA,

Plaintiff,

vs.

AMERICAN CAN COMPANY, a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant is a corporation organized under the laws of the State of New Jersey.

III.

That the said defendant, between the years 1949 and 1952, inclusive, had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1949	$1,592,838
1950	1,665,950
1951	1,478,199
1952	2,391,058

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1949 through and including 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $71,280.45, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and there is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $15,019.64, representing interest on said tax at the rate of 6% per annum, accrued from the due date to and including March 31, 1955, together with

(b) Interest on $71,280.45 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $86,300.09, together with interest at 6% per annum on the sum of $71,280.45 from and after March 31, 1955, until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $86,300.09, with interest on $71,280.45 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due plaintiff as established in the judgment to be entered herein; provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 9th day of April, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly Verified.

[Endorsed]: Filed April 9, 1955.

[Title of District Court and Cause.]

Civil Action File No. 7278-A

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Comes Now American Can Company, a corporation, through its attorneys, Faulkner, Banfield & Boochever, and moves the Court to dismiss the plaintiff's complaint in the above-entitled cause upon the following grounds:

(1) That the complaint does not state a claim against the defendant upon which relief can be granted.

(2) That the action was not brought within the time required by law.

Dated at Juneau, Alaska, this 29th day of April, 1955.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause.]

Civil Action File No. 7278-A

NOTICE OF MOTION; MOTION (1) TO STRIKE DEFENDANT'S MOTION TO DISMISS, AND (2) TO REQUIRE DEFENDANT TO ANSWER COMPLAINT

Notice of Motion

To: H. L. Faulkner, Attorney for Defendant:

Please take notice that on the 12th day of May, 1955, at 10:00 a.m. or as soon thereafter as counsel may be heard, the undersigned will move the Court, in the Federal Building, Juneau, Alaska, for an order (1) striking the motion to dismiss filed by the defendant, and (2) requiring the defendant to answer the complaint within 10 days thereafter.

Motion (1) to Strike Defendant's Motion to Dismiss and, (2) to Require Defendant to Answer the Complaint

Comes now the plaintiff through counsel in the above-entitled cause and moves this honorable Court to strike defendant's motion to dismiss on file herein, and to order defendant to file an answer to the plaintiff's complaint within 10 days after the hearing of this motion, for the following reasons:

1. That defendant's motion to dismiss fails to state the grounds therefore with particularly as is required by Rule 7(b), Federal Rules of Civil Procedure.

2. That the Statute of Limitations may not be raised on a motion to dismiss the complaint.

3. That the motion to dismiss is a dilatory pleading.

Wherefore, plaintiff moves that an order be entered striking defendant's motion to dismiss and directing the said defendant to file an answer within 10 days after the Court's action herein.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General,
Attorney for Plaintiff.

Receipt of Copy Acknowledged.
[Endorsed]: Filed May 5, 1955.

In the United States District Court for the District of Alaska, Division Number One, at Juneau
Civil Action No. 7279-A

TERRITORY OF ALASKA,

Plaintiff,

vs.

FIDALGO ISLAND PACKING COMPANY, a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant is a corporation organized under the laws of the State of Maine.

III.

That the said defendant, between the years 1949 and 1952, inclusive, had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1949	$158,246
1950	158,046
1951	158,046
1952	158,046

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1949 through and including 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $6,323.84, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and

there is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $1,391.43, representing interest on said tax at the rate of 6% per annum, accrued from the due date to and including March 31, 1955, together with

(b) interest on $6,323.84 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $7,715.27, together with interest at 6% per annum on the sum of $6,323.84 from and after March 31, 1955, until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $7,715.27, with interest on $6,323.84 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due plaintiff as established in the judgment to be entered herein; provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 9th day of April, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly verified.

[Endorsed]: Filed April 9, 1955.

[Title of District Court and Cause.]

Civil Action File No. 7279-A

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Comes Now Fidalgo Island Packing Company, a corporation, through its attorneys, Faulkner, Banfield & Boochever, and moves the court to dismiss the plaintiff's complaint in the above-entitled cause upon the following grounds:

(1) That the complaint does not state a claim against the defendant upon which relief can be granted.

(2) That the action was not brought within the time required by law.

Dated at Juneau, Alaska, this 29th day of April, 1955.

/s/ W. C. ARNOLD,
FAULKNER, BANFIELD & BOOCHEVER,
By /s/ H. L. FAULKNER,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause.]

Civil Action File No. 7279-A

NOTICE OF MOTION: MOTION (1) TO STRIKE DEFENDANT'S MOTION TO DISMISS, AND (2) TO REQUIRE DEFENDANT TO ANSWER COMPLAINT

Notice of Motion

To: H. L. Faulkner, Attorney for Defendant.

Please take notice that on the 12th day of May, 1955, at 10:00 a.m. or as soon thereafter as counsel may be heard, the undersigned will move the court, in the Federal Building, Juneau, Alaska, for an order (1) striking the motion to dismiss filed by the defendant, and (2) requiring the defendant to answer the complaint within 10 days thereafter.

Motion (1) to Strike Defendant's Motion to Dismiss and, (2) to Require Defendant to Answer the Complaint

Comes now the plaintiff through counsel in the above-entitled cause and moves this honorable court to strike defendant's motion to dismiss on file herein, and to order defendant to file an answer to the plaintiff's complaint within 10 days after the hearing of this motion, for the following reasons:

1. That defendant's motion to dismiss fails to state the grounds therefore with particularity as is required by Rule 7 (b), Federal Rules of Civil Procedure.

2. That the Statute of Limitations may not be raised on a motion to dismiss the complaint.

3. That the motion to dismiss is a dilatory pleading.

Wherefore, plaintiff moves that an order be entered striking defendant's motion to dismiss and directing the said defendant to file an answer within 10 days after the Court's action herein.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General,
Attorney for Plaintiff.

Receipt of copy asknowledged.

[Endorsed]: Filed May 5, 1955.

In the United States District Court for the District of Alaska, Division Number One, at Juneau

Civil Action No. 7280-a

TERRITORY OF ALASKA,

Plaintiff,

vs.

LIBBY, McNEILL & LIBBY, INC., a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant is a corporation organized under the laws of the State of Maine.

III.

That the said defendant, between the years 1949 and 1952, inclusive, had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1949	$770,481
1950	829,757
1951	790,460
1952	780,569

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1949 through and including 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $31,712.67, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and there is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $6,979.49, representing interest on said tax at the rate of 6% per annum, accrued from the due date to and including March 31, 1955, together with

(b) interest on $31,712.67 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $38,692.16, together with interest at 6% per annum on the sum of $31,712.67 from and after March 31, 1955, until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $38,692.16, with interest on $31,712.67 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due plaintiff as established in the judgment to be entered herein; provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 9th day of April, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly verified.

[Endorsed]: Filed April 9, 1955.

[Title of District Court and Cause.]

Civil Action No. 7280-A

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant moves the Court to dismiss Plaintiff's Complaint because (a) it fails to state a claim against defendant upon which relief can be granted and (b) the action was not commenced within the time limited or required by law.

Dated at Juneau, Alaska, April 29, 1955.

W. C. ARNOLD, and
ROBERTSON, MONAGLE & EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Defendant
Libby, McNeill & Libby.

Receipt of copy acknowledged.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause.]

Civil Action No. 7280-A

NOTICE OF MOTION: MOTION (1) TO STRIKE DEFENDANT'S MOTION TO DISMISS, AND (2) TO REQUIRE DEFENDANT TO ANSWER COMPLAINT

Notice of Motion

To: R. E. Robertson, Attorney for Defendant.

Please take notice that on the 12th day of May, 1955, at 10:00 a.m. or as soon thereafter as a counsel may be heard, the undersigned will move the court, in the Federal Building, Juneau, Alaska, for an order (1) striking the motion to dismiss filed by the defendant, and (2) requiring the defendant to answer the complaint within 10 days thereafter.

Motion (1) to Strike Defendant's Motion to Dismiss and, (2) to Require Defendant to Answer the Complaint

Comes now the plaintiff through counsel in the above-entitled cause and moves this honorable court to strike defendant's motion to dismiss on file herein, and to order defendant to file an answer to the plaintiff's complaint within 10 days after the hearing of this motion, for the following reasons:

1. That defendant's motion to dismiss fails to state the grounds therefore with particularity as is required by Rule 7 (b), Federal Rules of Civil Procedure.

2. That the Statute of Limitations may not be raised on a motion to dismiss the complaint.

3. That the motion to dismiss is a dilatory pleading.

Wherefore, plaintiff moves that an order be entered striking defendant's motion to dismiss and directing the said defendant to file an answer within 10 days after the Court's action herein.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1955.

In the United States District Court for the District of Alaska Division Number One, at Juneau
Civil Action No. 7281-A

TERRITORY OF ALASKA,

Plaintiff,

vs.

NAKAT PACKING COMPANY, a Corporation,

Defendant,

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant is a corporation organized under the laws of the State of New York.

III.

That the said defendant, between the years 1949 and 1952, inclusive, had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1949	$838,070
1950	841,573
1951	838,110
1952	853,440

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1949 through and including 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $33,711.93, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and there

is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $7,403.83, representing interest on said tax at the rate of 6% per annum, accrued from the due date to and including March 31, 1955, together with

(b) interest on $33,711.93 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $41,115.76, together with interest at 6% per annum on the sum of $33,711.93 from and after March 31, 1955, until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $41,115.76, with interest on $33,711.93 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due plaintiff as established in the judgment to be entered herein; provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the

sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 9th day of April, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly verified.

[Endorsed]: Filed April 9, 1955.

[Title of District Court and Cause.]

Civil Action No. 7281-A

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant moves the Court to dismiss Plaintiff's Complaint because (a) it fails to state a claim against defendant upon which relief can be granted and (b) the action was not commenced within the time limited or required by law.

Dated at Juneau, Alaska, April 29, 1955.

W. C. ARNOLD, and
ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for the Nakat
Packing Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed April 29, 1955.

[Title of District Court and Cause.]

Civil Action No. 7281-A

NOTICE OF MOTION: MOTION (1) TO STRIKE DEFENDANT'S MOTION TO DISMISS, AND (2) TO REQUIRE DEFENDANT TO ANSWER COMPLAINT

Notice of Motion

To: R. E. Robertson, Attorney for Defendant.

Please take notice that on the 12th day of May, 1955, at 10:00 a.m. or as soon thereafter as counsel may be heard, the undersigned will move the court, in the Federal Building, Juneau, Alaska, for an order (1) striking the motion to dismiss filed by the defendant, and (2) requiring the defendant to answer the complaint within 10 days thereafter.

Motion (1) to Strike Defendant's Motion to Dismiss and, (2) to Require Defendant to Answer the Complaint

Comes now the plaintiff through counsel in the above-entitled cause and moves this honorable court to strike defendant's motion to dismiss on file herein, and to order defendant to file an answer to the plaintiff's complaint within 10 days after the hearing of this motion, for the following reasons:

1. That defendant's motion to dismiss fails to state the grounds therefore with particularity as is required by Rule 7 (b), Federal Rules of Civil Procedure.

2. That the Statute of Limitations may not be raised on a motion to dismiss the complaint.

3. That the motion to dismiss is a dilatory pleading.

Wherefore, plaintiff moves that an order be entered striking defendant's motion to dismiss and directing the said defendant to file an answer within 10 days after the Court's action herein.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 5, 1955.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A and 7281-A

MINUTE ORDER

Friday, May 6, 1955

Upon the calling up of defendants' Motion to Dismiss the Complaint in two of the above cases, counsel stipulated that argument of the motion be set for a later time, and that all four cases be combined for the purpose of arguing the same motion in each case. The court set Thursday next at 10 a.m. as time for the hearing.

In the United States District Court for the District of Alaska Division Number One, at Juneau

Civil Action No. 7300-A

TERRITORY OF ALASKA,

Plaintiff,

vs.

NEW ENGLAND FISH CO., a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant has represented itself heretofore as a corporation and has done business in the Territory of Alaska under the name "New England Fish Company" during the years 1951 and 1952.

III.

That the said defendant, between the years 1951 and 1952, inclusive, had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1951	$448,581
1952	445,401

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1951 and 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $8,939.82, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and there is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $431.82, representing interest on said tax at the rate of 6% per annum, accrued from

the due date to and including March 31, 1955, together with

(b) interest on $8,939.82 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $10,371.14, together with interest at 6% per annum on the sum of $8,939.82 from and after March 31, 1955, until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $10,371.14, with interest on $8,939.82 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due plaintiff as established in the judgment to be entered herein; provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of May, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1955.

[Title of District Court and Cause.]

Civil Action File No. 7300-A

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Comes Now New England Fish Co., a corporation, through its attorneys, Faulkner, Banfield & Boochever, and moves the court to dismiss the plaintiff's complaint in the above-entitled cause upon the following grounds:

(1) That the complaint does not state a claim against the defendant upon which relief can be granted.

(2) That the action was not brought within the time required by law.

Dated at Juneau, Alaska, this 31st day of May, 1955.

/s/ W. C. ARNOLD,

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ H. L. FAULKNER,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31, 1955.

In the United States District Court for the District of Alaska Division Number One, at Juneau

Civil Action No. 7301-A

TERRITORY OF ALASKA,

Plaintiff,

vs.

P. E. HARRIS COMPANY, INC., a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant is a corporation organized under the laws of the State of Washington.

III.

That the said defendant, between the years 1951 and 1952 inclusive, had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1951	$296,924
1952	296,924

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1951 and 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $5,938.48, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and there is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $950.16, representing interest on said tax at the rate of 6% per annum, accrued from the due date to and including March 31, 1955, together with

(b) interest on $5,938.48 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $6,888.64, together with interest at 6% per annum on the sum of $5,938.48, from and after March 31, 1955, until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $6,888.64 with interest on $5,938.48 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of May, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1955.

[Title of District Court and Cause.]

Civil Action, File No. 7301-A

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant moves the Court to dismiss Plaintiff's Complaint because (a) it fails to state a claim against defendant upon which relief can be granted and (b) the action was not commenced within the time limited or required by law.

Dated at Juneau, Alaska, May 31, 1955.

W. C. ARNOLD, and
ROBERTSON, MONAGLE & EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Defendant P. E. Harris Company, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31, 1955.

In the United States District Court for the District of Alaska Division Number One, at Juneau

Civil Action No. 7302-A

TERRITORY OF ALASKA,

Plaintiff,

vs.

PACIFIC & ARCTIC RAILWAY & NAVIGATION COMPANY, a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant is a corporation organized under the laws of the State of West Virginia.

III.

That the said defendant, between the years 1950 and 1952, inclusive, had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1950	$360,700
1951	360,700
1952	360,700

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1950 through and including 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $10,821.00, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and there is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $2,055.99, representing interest on said tax at the rate of 6% per annum, accrued from the due date to and including March 31, 1955, together with

(b) interest on $10,821.00 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $12,876.99, together with interest at 6% per annum on the sum of $10,821.00 until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $12,876.99, with in-

terest on $10,821.00 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due plaintiff as established in the judgment to be entered herein; provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of May, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1955.

[Title of District Court and Cause.]

Civil Action File No. 7302-A

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Comes Now Pacific & Arctic Railway & Navigation Company, a corporation, through its attorneys, Faulkner, Banfield & Boochever, and moves the court to dismiss the plaintiff's complaint in the above-entitled cause upon the following grounds:

(1) That the complaint does not state a claim against the defendant upon which relief can be granted.

(2) That the action was not brought within the time required by law.

Dated at Juneau, Alaska, this 31st day of May, 1955.

FAULKNER, BANFIELD & BOOCHEVER,

By /s/ H. L. FAULKNER,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31, 1955.

In the United States District Court for the District of Alaska Division Number One, at Juneau

Civil Action No. 7303-A

TERRITORY OF ALASKA,

Plaintiff,

vs.

OCEANIC FISHERIES CO., a Corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, Territory of Alaska, and for its cause of action against the defendant above named alleges:

I.

That the Territory of Alaska is a sovereign incorporated territory, organized under the laws of the United States.

II.

That the defendant is a corporation organized under the laws of the State of Washington.

III.

That the said defendant, between the years 1951 and 1952 had certain taxable real and personal property within the Territory of Alaska, the full and true value being as follows:

1951	$257,831
1952	155,012

IV.

That by reason of the fact that this property was in the Territory of Alaska during the years 1951 and 1952, defendant owes plaintiff, as of March 31, 1955, the sum of $4,128.43, plus interest, the same being property taxes due the plaintiff under the provisions of Chapter 10, Session Laws of Alaska, 1949.

V.

That by reason of the fact that said tax and interest was not paid when due, although demands have been made of the defendant, said tax is now, and has been for some time past, delinquent, and there is as of March 31, 1955, due and owing to the plaintiff, in addition to said tax:

(a) The sum of $691.40 representing interest on said tax at the rate of 6% per annum, accrued from the due date to and including March 31, 1955, together with

(b) interest on $4,128.43 at the same rate from and after March 31, 1955, until paid.

VI.

That the total sum as of March 31, 1955, due and owing plaintiff from defendant is $4,819.83, together with interest at 6% per annum on the sum of $4,128.43 from and after March 31, 1955, until paid.

Wherefore, plaintiff prays that the Court enter herein a decree as follows:

1. That plaintiff have judgment against the defendant for the total sum of $4,819.83 with interest on $4,128.43 at 6% per annum from March 31, 1955, until paid.

2. Ordering all of defendant's property not exempt by law to be sold to satisfy the sums due plaintiff and that plaintiff be permitted, if it so desires, to bid for and purchase said property and to off-set such bid with the amount of the debt due plaintiff as established in the judgment to be entered herein; provided, however, that if the proceeds of said sale are insufficient to satisfy the judgment, the sum remaining unsatisfied may be enforced by execution as in ordinary cases.

3. Ordering that the remainder of the proceeds, if any, after the payment of the judgment and all costs herein be remitted to the defendant.

4. For such other and further relief as to the Court may seem meet and just.

Dated at Juneau, Alaska, this 12th day of May, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General.

Duly verified.

[Endorsed]: Filed May 12, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant moves the Court to dismiss Plaintiff's Complaint because (a) it fails to state a claim against defendant upon which relief can be granted and (b) the action was not commenced within the time limited or required by law.

Dated at Juneau, Alaska, May 31, 1955.

ROBERTSON, MONAGLE & EASTAUGH,

By /s/ R. E. ROBERTSON,

Attorneys for Defendant Oceanic Fisheries Company, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31, 1955.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A and 7281-A

OPINION

Filed May 24, 1955

The defendants have moved to dismiss the plaintiff's complaint on the grounds that (1) it does not state a claim for which relief can be granted, and (2) that the statute of limitations (presumably Sec. 55-2-7 of the Code) has run. The plaintiff has coun-

tered by a motion to strike the defendants' motion on the following grounds: (1) that the grounds of the motion to dismiss were not stated with particularity as required by Rule 7(b) (1) F.R. Civ. P.; (2) that the bar of statute of limitations is not available on a motion to dismiss the complaint; and, (3) that the motion is dilatory. The second ground has been abandoned in view of Suckow Borax Mines vs. Borax Consolidated, 185 F. 2d. 196, 202 (9th Cir.), and hence will not be discussed.

Argument of the defendants' motion to dismiss has been deferred pending a disposition of the plaintiff's motion to strike.

The defendants' answer to plaintiff's argument that the motion to dismiss requires particularity is that it conforms to Form 19 of the Appendix of Forms to the F.R. Civ. P. The question presented, therefore, is whether this form meets the requirement of particularity under Rule 7(b) (1). There is a dearth of authority on this question and even that is in conflict. Thus the view stated in 1 Barron & Holtzoff, 405-6, Sec. 244, that Form 19 is deficient is opposed by Moore in 2 Moore's Federal Practice, 1511-12, Sec. 7.05. So far as diligent search discloses, no court has denied a motion conforming to Form 19 as insufficient. And, although it was indicated in Advertisers' Exchange, Inc., vs. Bayless Drug Store, 3 F.R.D. 178, and Trammel vs. Fidelity and Casualty Co. 45 F.S. 366, 367-8, that the language of Form 19 is insufficient, the court in each instance nevertheless proceeded to decide the motion on the

merits. It is also noteworthy that in Sapero vs. Shackleford, 109 F.S. 321-2, and Kirby vs. Pennsylvania Railroad Co., 92 F.S. 417, 423 reversed on other grounds, 188 F. 2d. 793, it was held that motions in the form of that here dealt with were sufficient. It should be noted in this connection, however, that the first two cases cited were decided in 1942, prior to the following amendment of Rule 84:

> "The forms contained in the Appendix of Forms are sufficient under the rules." (Emphasis supplied.)

Although it can hardly be said that the matter is free from doubt, Munson Line vs. Green, 6 F.R.D. 470, 474, it would appear that under the cases cited supra the court is warranted in holding that Form 19 is sufficient to meet the requirements of Rule 7, 2 Moore, 2265-6, Sec. 12.14. Undoubtedly, since a contrary holding would eliminate surprise and delay and thus conduce to the administration of justice, I am convinced that this Court should, in the interest of justice, adopt a rule in conformity with that existing in most federal jurisdictions requiring the movant to submit a brief or memorandum in support of his motion.

The conclusion reached makes it unnecessary to decide the third objection.

One other observation may be pertinent. A motion to strike a motion is not only not authorized by the Rules but considered quite unnecessary, Berens,

vs. Berens, 30 F.S. 869; Klages vs. Cohen, 5 F.R.D. 32, 34; Madusa Portland Cement Co. vs. Pearl Assurance Co., 5 F.R.D. 332-3; In re Amsterdam Brewing Co., Inc., 35 F.S. 618-619; Welcher vs. U. S., 14 F.R.D. 235, 237.

An order may be presented denying the motion to strike.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed May 25th, 1955.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A and 7281-A

ORDER OVERRULING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION TO DISMISS

This matter having come on before the Court on May 12, 1955, upon motion of plaintiff to strike the motions filed by defendants hereinabove named to dismiss the complaints, and the plaintiff appearing by Henry J. Camarot, Asst. Attorney General, and the defendants by H. L. Faulkner and R. E. Robertson, and the parties having argued the motion of plaintiff to strike defendants' motions, and having thereafter filed briefs, and the Court having considered the matter and being fully informed and having filed its written Opinion on May 24, 1955,

It Is Hereby Ordered that plaintiff's motions to strike defendants' motions be, and they are hereby denied in each of the above-entitled cases which have been consolidated for the purpose of arguing the motions of defendants to dismiss plaintiff's complaints and the motion of plaintiff to strike defendants' motions.

Dated this 31st day of May, 1955.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 31st, 1955.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A, 7281-A, 7300-A, 7301-A, 7302-A and 7303-A

MINUTE ORDER
FRIDAY, OCTOBER 28, 1955 (4)

These cases, all relating to the same question and the same Motion to Dismiss being filed in each case, they had previously been consolidated for the purpose of hearing. Counsel appeared as follows: H. L. Faulkner for Nos. 7278-A, 7279-A, 7300-A and 7302-A. R. E. Robertson appeared for defendant companies in Nos. 7280-A, 7281-A, 7301-A and 7303-A. Winton C. Arnold appeared for all defend-

ants. The cases numbered in the 73 hundreds had not been included in the consolidation order made by the late Hon. George W. Folta, so upon motion of counsel, the court at this time entered an order consolidating all eight cases, on two of which, orders were signed. Henry J. Camarot, Asst. Attorney General, appeared for the plaintiff, Territory of Alaska. The court ruled that argument time would be enlarged over that as provided by rule for arguing motions, by extending to counsel the remainder of the day, divided equally, or about 1 Hr. and 15 Min. to each side.

Mr. Arnold opened the argument for defendant companies, and he was followed by Mr. Faulkner; Mr. Robertson presenting no argument. Mr. Camarot argued for the Territory and then Mr. Arnold closed for defendants. Mr. Camarot asked for permission to file his brief and he was given 10 days, and 10 days was allowed to defendants for reply brief if they found it necessary. Before adjournment was taken, the court stated that it was of the opinion that possibly these cases should be decided on their merit rather than on procedure or remedy.

Thereupon court was adjourned till tomorrow morning at 10:00 o'clock.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A, 7281-A, 7300-A, 7301-A, 7302-A and 7303-A

REPORTER'S TRANSCRIPT OF PLAINTIFF'S OFFER OF PROOF, OCTOBER 28, 1955

Be It Remembered, that on the 28th day of October, 1955, at 2:00 o'clock p.m., at Juneau, Alaska, the above-entitled causes came on for hearing on defendants' motion to dismiss; the Honorable Walter H. Hodge, United States District Judge, presiding; the plaintiff appearing by Henry J. Camarot, Assistant Attorney General of Alaska; the defendants in cause Nos. 7278-A, 7279-A, 7300-A and 7302-A appearing by H. L. Faulkner and W. C. Arnold, their attorneys; the defendants in cause Nos. 7280-A, 7281-A, 7301-A and 7303-A appearing by R. E. Robertson and W. C. Arnold, their attorneys; and at said hearing the following offer of proof was made by plaintiff's attorney:

The Court: Will you make your offer again, counsel?

Mr. Camarot: If the Court please, when the defendants argued their motions to dismiss, they recognized the general repealer clause, Section 19-1-1. However, they stated that they were of the opinion that Chapter 22, S.L.A. 1953, and particularly Section 2 (a), was a special repealer clause which necessarily made an exception to the general repealer clause, and, therefore, all taxes that would have been

due and owing to the Territory of Alaska prior to 1953 would be null and void.

The Territory wishes at this time to call the Court's attention to the fact that Section 2 (a) of Chapter 22——

The Court: Counsel, I understood you were not to argue this point, but you may introduce this evidence here.

Mr. Camarot: I just want to give the background, if the Court please, so it will be clear in the record.

The Court: Very well.

Mr. Camarot: The Territory of Alaska, plaintiff, wishes to call to the Court's attention that Section 2 (a) is not in fact merely a special repealer clause but, rather, adds an extra ingredient and, really, advantage to the municipalities, school or public utility districts who may be involved in that it permits them to levy and assess during the current fiscal year, which could be beyond the year 1952 and to the year 1953, an additional assessment. The Territory was completely prohibited from levying any taxes after 1952.

In further support that this was the intent of the Legislature I would like to introduce House Bill No. 3, which contains a provision to the effect "That all accrued and unpaid taxes on real property and improvements, and personal property, boats and vessels, levied under the provisions of Chapter 10, S.I.A. 1949, are hereby cancelled, repealed and abrogated, and declared null and void." And I proffer this particular evidence to show the intent of the

Legislature was not to permit the cancellation of all taxes due and owing prior to 1952 in that they specifically omitted this particular section. There is no question this particular section was included in the original House Bill which was introduced, and I call to the Court's attention that the final act which is in the regular Session Laws completely omits that phrase which cancels all previous taxes.

The Court: You have made your offer. I understand the defendants object.

Mr. Arnold: For the grounds previously stated we object, your Honor.

Mr. Camarot: If the Court please, I don't know that the grounds previously stated will show in the record.

The Court: Well, it is not necessary. This matter is before the Court upon a motion to dismiss the complaint of plaintiff in these several cases, consolidated, upon the grounds that it fails to state a claim under the Federal Rules of Civil Procedure. In such a hearing we cannot introduce evidence of something other than the acts of the Legislature or such matters as Journal entries, of which the Court could take judicial notice, indicating any such intent or indicating the question of intent. We can hear only tests and sufficiency of the complaint, for which reason the offer to introduce this exhibit of the House Bill, which was not passed, as I understand it, by the Legislature, must be denied. I might add that, even if admitted, from the statement of counsel such bill would not bear out counsel's contention.

Mr. Camarot: For the record, I will note our exception to that, if the Court please, and, if I may, if there is no objection, I would like to call the Court's attention to the case of Jefferson Hotel Company vs. Jefferson Standard Life Insurance Company, 7 Federal Rules Decisions 722; Michel vs. Meier, 8 Federal Rules Decisions 464; and the General Rules of Statutory Construction, Citing 82 Corpus Juris Secundum, page 736, et seq.

The Court: Well, the same ruling, except we will state that the Court will take notice of all acts of the Legislature, of all Journal entries of either House or Senate, as they may appear of record, in determining this matter of the tax.

Mr. Camarot: I understand the Court's ruling, I believe.

(End of Record.)

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A, 7281-A, 7300-A, 7301-A, 7302-A and 7303-A

REPORTER'S TRANSCRIPT OF EXTRACT OF PROCEEDINGS, OCTOBER 28, 1955

Be It Remembered, that on the 28th day of October, 1955, at 2:00 o'clock p.m., at Juneau, Alaska, the above-entitled causes came on for hearing on defendants' motion to dismiss; the Honorable Walter H. Hodge, United States District Judge, presiding;

the plaintiff appearing by Henry J. Camarot, Assistant Attorney General of Alaska; the defendants in cause Nos. 7278-A, 7279-A, 7300-A and 7302-A appearing by H. L. Faulkner and W. C. Arnold, their attorneys; the defendants in cause Nos. 7280-A, 7281-A, 7301-A and 7303-A appearing by R. E. Robertson and W. C. Arnold, their attorneys; and at the conclusion of the hearing the following occurred:

The Court: Not long ago an opinion of one of the Justices of the Circuit Court of Appeals concluded rather facetiously with the remark that the Court was not going to decide something that it does not have to decide which can be put off until another time.

If we should take that position here, I think this matter can be determined immediately without briefs on the question purely of remedy because I cannot conceive how possibly, under the interpretation which the plaintiff seeks to present here of the provision set up by Chapter 10 of the Laws of '49, which enforces the real property tax, there can be conceivably any remedy to bring a suit for individual liability for it is not claimed that any tax was ever set. It merely says that certain taxes became due, and they do not follow at all the procedure set up for the foreclosure of the lien of the taxes by the Tax Commissioner. I feel that is the only issue here.

As to the remedy taken by the Territory, I feel that there would be nothing for the Court to do but

to dismiss the action, but it occurs to me that if we do that we will be doing precisely what was done in the Hess case. We will merely defer the more important question of whether or not the tax may be in fact collected by proper remedy, and in any attempt to dodge that issue it is going to come back to the Court to be decided in the future, the same as it was in the Hess case.

Therefore, I think it is incumbent upon the Court to not dispose of this case entirely upon this issue of remedy but also to look to the merits of the thing and try and determine whether the repealing clause with the expressed saving clause therein, the repealing act of 1953 with the expressed saving clause of Section 2, in effect cancelled the taxes, or that portion of the real and property tax which accrues to the Territory, or whether, as contended, the saving clause is meant to apply to all taxes, or whether, as contended, the saving clause does not apply, but that the matter should be determined instead upon Section 19-1-1 of the Compiled Laws of Alaska.

Therefore, we shall examine the question and try and determine the whole matter on the merits of the controversy rather than the question of remedy. Now, perhaps, I am undertaking more than we need to do, but I feel that if I dismiss this case on the question of remedy that it is going to come right back at us again because the Territory can probably start another suit, so we will consider then the briefs submitted by both parties and file a written opinion whenever we are able to determine the matter, which possibly can be done while the court

party is at Ketchikan, that is, providing that they give us one day out of a month off the bench down there, which they haven't been doing here.

Mr. Camarot: If the Court please, do I understand that on the motion to dismiss the Court is going to decide this matter on the merits, and you would like——

The Court: Yes; rather than on the question of procedure. I feel that on the question of procedure that there is no doubt that the thing is not properly before the Court, but we will try and determine it instead on the matter of the merits.

Mr. Camarot: I see; and you would like briefs based primarily on the merits of the case.

The Court: Well, of course, if you wish to still urge the other matter, why, I do not preclude you from doing so.

Mr. Camarot: You don't preclude me from urging, but you are indicating what you are going to do.

The Court: But, as the man from Missouri says, you will have to show me, counsel.

(End of Record.)

EXHIBIT "A"

Proof of Official Record

I. Waino Hendrickson, Secretary of the Territory of Alaska, do hereby certify that I have compared the paper to which this certificate is attached with

the original Senate Bill No. 5 as the same appears of record and on file in my office, at the Federal Building, in the City of Juneau, Territory of Alaska, and that the same is a true and correct copy of said Original and the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office, at Juneau, Alaska, this 5th day of November, 1955.

[Seal] /s/ WAINO E. HENDRICKSON,
Secretary of Alaska.

In the Senate

By Senators Jensen, Stepovich, Robison, Engstrom, Lhamon, Gorsuch, Barnes, Coble, Snider, Lyng, and Jones

Senate Bill No. 5

In the Legislature of the Territory of Alaska
Twenty-First Session

A Bill

For an Act entitled:

"An act to repeal Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and abrogating and repealing all accrued and unpaid taxes levied thereunder, and declaring an emergency."

Be It Enacted by the Legislature of the Territory of Alaska

Section 1. That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed.

Section 2. That all accrued and unpaid taxes on real property and improvements, and personal property, boats and vessels, levied under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, are hereby cancelled, repealed and abrogated, and declared null and void.

Section 3. An emergency is hereby declared to exist and this act shall be in full force and effect for and after the date of its passage and approval.

S.B. No. 5

(Copy.)

EXHIBIT "B"

Proof of Official Record

I, Waino Hendrickson, Secretary of the Territory of Alaska, do hereby certify that I have compared the paper to which this certificate is attached with the original House Bill No. 3 as the same appears of record and on file in my office, at the Federal Building in the City of Juneau, Territory of Alaska, and that the same is a true and correct copy of said original and the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office, at Juneau, Alaska, this 28th day of October, 1955.

[Seal] /s/ WAINO E. HENDRICKSON,
Secretary of Alaska;

By /s/ MARGUERITE P. SHAW,
Secretary to the Secretary of Alaska.

In the House

By Mr. Hurley

House Bill No. 3

In the Legislature of the Territory of Alaska
Twenty-First Session

A Bill

For an Act entitled:

"An act to repeal Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and abrogating and repealing all accrued and unpaid taxes levied thereunder, and declaring an emergency."

Be It Enacted by the Legislature of the Territory of Alaska

Section 1. That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed.

Section 2. That all accrued and unpaid taxes on real property and improvements, and personal prop-

erty, boats and vessels, levied under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, are hereby cancelled, repealed and abrogated, and declared null and void.

Section 3. An emergency is hereby declared to exist and this act shall be in full force and effect for and after the date of its passage and approval.

H.B. No. 3

(Copy.)

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A, 7281-A, 7300-A, 7301-A, 7302-A and 7303-A

OPINION

In 1949 the Alaska Territorial Legislature enacted the first general property tax act of the Territory, being Chapter 10, S.L.A., 1949, known as the "Alaska Property Tax Act." Such act provided for the levy, assessment and collection of a tax upon all real and personal property in the Territory (except property specifically exempted) at the rate of 1% of the value thereof. It provided that the tax within the limits of incorporated cities, school districts and public utility districts, shall be assessed and collected in the manner prescribed by the property tax law of the municipality or district; and set

up specific provisions for the assessment, levy, and collection of the tax outside of such cities and taxing districts. The tax collected within such cities, school districts and public utility districts was to be retained by them; and the tax collected outside of the same was payable into the Treasury of the Territory. This act was repealed by Chapter 22, S.L.A. 1953, hereinafter referred to as the "repealing act." Section 2 of this act contained the following express savings clause:

"Section 1 of this Act shall not be applicable to

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district;"

In April, 1955, the Territory filed the above-entitled actions seeking to recover judgment against the several defendants named for taxes acrued under the provisions of Chapter 10 for the years 1949-1952 inclusive, which the defendants had refused to pay. The defendant in each case filed a motion to dismiss plaintiff's complaint on the grounds that the complaint does not state a claim upon which relief can be granted and that the action was not brought within the time limited by law. Hearing was had before the Court on such motions and the matter submitted on briefs.

At the conclusion of the oral argument the Court held that no personal action would lie against the defendants for recovery of the taxes involved and that the plaintiff had not sought the proper remedy for foreclosure of the lien of the tax in the manner provided by law; but that to avoid a multiplicity of actions, the matter would be determined on its merits, as to whether or not the Territory has any right for collection of such taxes in view of the repeal—that is, whether the taxes sought to be collected survive the repeal and if such taxes did survive, whether there is a remedy available for their collection.

The Territory, in its brief, again raises this question of procedure, claiming a personal liability of the defendants for such taxes. This issue has been squarely determined against the plaintiff by the District Court for this Division in the case of City of Yakutat vs. Libby, McNeil & Libby, 13 Alaska 378, 98 F. Supp. 101. Such action involved the question of remedy as to taxes levied by municipalities in which the Court held that the remedy sought of a personal action against the taxpayer is not available since the remedy prescribed by statute is exclusive. In the same manner Chapter 10 provided an exclusive method of levy and collection of the general property tax. This question, therefore, will not be further considered.

Plaintiff relies in support of its position that the accrued and unpaid taxes were not cancelled or repealed by the repealing act upon the "general sav-

ings clause" of the Territory, being Sec. 19-1-1, A.C.L.A., 1949, which statute provides as follows:

> * * *"'The repeal or amendment of any statutes shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute * * *"

the defendants' position is that this Alaska general savings act, being in conflict with the special savings clause of the repealing act, has no application and saved only the taxes levied by municipalities, school or public utility districts.

It is a fundamental rule of statutory construction that a general savings clause or statute preserves rights and liabilities which have accrued under the act repealed and that they operate to make applicable in designated situations the law as it existed before the repeal, unless such application is negatived by the express terms or clear implication of a particular repealing act, or where not otherwise provided by the repealing act. And, where there are express savings clauses in repealing statutes which are later in time, constituting the express will of the Legislature, such have been taken as an indication of legislative intent to save nothing else from the repeal, and the general savings statute in force in the state does not apply. 82 C.J.S., Statutes, 1014, Sec. 440; 50 Am. Jur.,

Statutes, 534-5, Secs. 527-528; Great Northern Ry. Co. vs. United States, 208 U. S. 452; Wilmington Trust Co. vs. United States, 28 F. 2d 205; United States vs. Chicago, St. P., M. & O. Ry. Co., 151 F. 84; United States vs. Standard Oil Co., 148 F 719.

In the Wilmington Trust Co. case the District Court of Delaware held that repeal of parts of the Revenue Act of 1918 by the Revenue Act of 1921, which provided that the parts repealed shall remain in force as to "the assessment and collection of all taxes which have accrued" under the previous act, left all of the estate tax provisions of the former statute except those expressly saved by the act "as completely obliterated and extinguished * * * as if the repeal had been absolute and unqualified," since the saving clause kept alive the repealed parts of the earlier act for collection of only those taxes "accrued" under the earlier act, and saves to the government only such previously accrued taxes. In this case the general Federal savings clause (R.S. Sec. 13, 1 U.S.C.A. 29) was relied upon to show that the liability of the tax was not destroyed by the repeal of the statute. Upon this point the opinion states:

> "Of this statute the court, in Great Northern Railroad Co. vs. United States, 208 U.S. 452, 28 S. Ct. 313, 52 L. Ed. 567, said: As it 'has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implica-

> tion, in a subsequent enactment.' As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others. To enlarge the exceptions by adding the provisions of Sec. 13 of the Revised Statutes thereto, or, more accurately stated, to add to the saving clause of the repealing statute the provisions of R.S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be a plain disregard of the will of Congress as manifested in the repealing act. * * *"

by the same token, it follows that the provisions of the Alaska savings act cannot justify a disregard of the express will of the Legislature as manifested in the subsequent enactment.

Plaintiff contends that the soundness of the Court's reasoning in this case has been subsequently questioned in other decisions, citing New York Life Ins. Co. vs. Bowers, 34 F. 2d 60; Schoenheit vs. Lucas, 44 F. 2d 476; Alker vs. United States, 38 F. 2d 879; Hanna vs. United States, 68 Ct. of Claims 45; and Burrows vs. United States, 56 F. 2d 465. In these cases the decision in the Wilmington Trust Co. case is distinguished in application only as to the time that the tax involved was regarded as accrued, or was applied under differing circumstances; but we cannot find that the principle

announced as above quoted is departed from in these decisions.

Plaintiff also relies upon the decision of the Circuit Court of Appeals for the 8th Circuit in the case of Great Northern Ry. Co. vs. United States, 155 F. 945; affirmed by the Supreme Court, 208 U.S. 452, which does not relate to a savings clause in a repealing statute but rather to an amending statute reenacting the former statute with changes. The defendant contended that the effect of the amending act was to repeal it, and hence he could not be prosecuted under the former act. The Court held against such contention, stating that:

> "Where a statute is amended 'so as to read as follows' or is reenacted with changes, or is in terms repealed and simultaneously reenacted with changes, the amendatory or reenacting act becomes a sustitute for the original, which then ceases to have the force and effect of an independent enactment * * *"

and that "in these circumstances" the special savings clause in the amending statute would not by implication extinguish liabilities accrued under the previous act, and not expressly saved by the act. In affirming this decision, the opinion of the Supreme Court states (p. 464): "Conceding for the sake of argument only that the effect of the amendment and reenactment of the Elkins Act by Sec. 2 of the Hepburn law was to repeal the Elkins Act," the Court would then proceed to determine what effect such repeal would have in the light of the general savings

clause; and expressly held as quoted in the Wilmington Trust Co. case above (p. 465).

There is another fundamental rule of statutory construction which must be considered in this connection, and that is the rule of "expressio unius est exclusio alterius"—the mention of one is the exclusion of others—which requires a holding that the Legislature intended to save the taxes specifically mentioned in the repealing act and to exclude all others. Sutherland on Statutory Construction, 3rd Ed. Vol. 2, p. 412, Sec. 4915; p. 416, Sec. 4916; Jones vs. Crosswell, Inc., 60 F. 2d 827; Ryholt vs. Jarrett, 112 F. 2d 642; Territory ex rel Sulzer vs. Canvassing Board, 5 Alaska 602, p. 622.

A decision of the Supreme Court of Kansas in the case of State vs. Showers, 8 p. 474, is especially in point, as it relates to a state savings clause as distinguished from the Federal savings clause. In that case the Court was considering the effect of a general savings statute identical with the Alaska statute, as against a later specific savings proviso contained in a repealing act. The opinion of the Court states as follows:

> "The question as to what should be repealed and what saved was before the legislature. They had the entire subject matter thereof under consideration, and evidentally intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be

> saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. Expressio unius est exclusio alterius."

the opinion also points out that if the special savings cause in the repealing act was not intended to cover the entire ground and to substitute for the general savings statute, then it "has no office to perform," for the general savings clause would save all that it saves and very much more. In the same manner, if we adopted the view of the plaintiff, the savings clause of Sec. 2 of the 1953 Act would have no office to perform and would be meaningless.

Plaintiff also argues that Section 2 of the repealing act was not intended to be a savings clause, but was intended to "afford" or "allow" municipalities, school and public utility districts additional revenues by allowing them to still levy and assess taxes previously accrued and to accrue during the fiscal year. This logic may be likened to arguing that a revenue act does not create a revenue tax but is levied only for the purpose of collecting revenue; and is wholly unsound. Further, plaintiff contends that there was no intent to cancel all accrued taxes, other than those expressly saved. We cannot so disregard the obvious intent of the Legislature. Plaintiff also argues that the provisions of Section 2 and of the general savings clause are not in conflict and are not to be considered "in pari materia"; and that revenue laws should not be considered repealed "by

implication." However, there is an irreconcilable conflict between the two statutes, and there appears no repeal by implication, but rather by express enactment.

Plaintiff also directs our attention to the fundamental rule that the intent of the Legislature should govern, which, of course, is true; and suggests that resort should be had to the history of the passage of the act through the Legislature to determine such intent. Exhibits offered by the plaintiff include another bill introduced in the Legislature, which was rejected at the hearing and cannot be considered, as it is not a part of the legislative history of the act in question. However, the Court may take judicial notice of the history of the passage of this particular act to determine the meaning of terms and expressions if they are in any way ambiguous. The repealing act as passed was House Bill No. 3. Reference to the House Journal discloses that the bill as originally introduced on January 27th was entitled:

> "An act to repeal Chapter 10, S.L.A., 1949, as amended by Chapter 88, S.L.A., 1949, and abrogating and repealing all accrued and unpaid taxes levied thereunder, and declaring an emergency." (H. J. p. 45.)

which, it is noted, specifically provided for cancelling and repealing all accrued and unpaid taxes. The Committee on Judiciary recommended that the bill pass with the following amendment: That the title be changed to read:

"An Act to repeal the Alaska Property Tax Act enacted by Chapter 10, S.L.A., 1949, as amended by Chapter 88, S.L.A., 1949, and declaring an emergency." (H. J. p. 103.)

as thus amended the act would have saved all accrued taxes under the general savings clause. Thereafter other amendments were proposed but failed of passage and on February 11 the bill passed the House and was sent to the Senate (H. J. p. 219). The Senate amended the act by adding thereto Section 2 as it appears above (S. J. p. 244), which expressly saved only the taxes levied and assessed by a municipality, school or public utility district. In this form the bill passed the Senate and was sent back to the House (S. J. p. 441). The House concurred in the Senate amendment (H. J. p. 517), in which form the bill passed both Houses. Hence it is clear that the final decision of the Legislature was neither to abrogate all accrued and unpaid taxes levied under the act nor to save them, but to save only those taxes levied and assessed by municipalities, school and public utility districts. Such intent is further borne out from the title of the repealing act as finally passed, which reads as follows:

"To repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949; excepting from repeal certain taxes and tax exemptions; and declaring an emergency." (Emphasis added.)

When the Legislature of the Territory has spoken in clear language and when by so doing appears to have declared a positive policy with accurate precision, the courts may not be called upon to distort the language of the Legislature, however undesirable such may appear to the taxing authorities of the Territory, or however unjust such result may be as to those taxpayers who paid the property tax without protest.

The general property tax throughout the Territory not being saved, the Territory is also without remedy to collect and enforce such accrued taxes. 50 Am. Jur. 535, Sec. 529; Sutherland on Statutory Construction, 3rd Ed. Sec. 2050, Vol. 1, p. 537; Vance vs. Rankin, 62 N.E. 807; Schmuch vs. Hartman, 70 Atl. 1091.

I conclude, therefore, that under the provisions of Section 2 of the repealing act neither the tax nor the remedy survive the repeal.

In view of this decision, the question of the statute of limitations need not be considered.

Defendants' motion to dismiss is granted and judgment of dismissal for failure of the plaintiff to state a claim upon which relief can be granted may be entered.

Dated at Juneau, Alaska, this 4th day of January, 1956.

WALTER H. HODGE,
District Judge.

[Endorsed]: Filed January 4th, 1956.

In the District Court for the District of Alaska
Division Number One at Juneau

No. 7278-A

TERRITORY OF ALASKA,
Plaintiff,

vs.

AMERICAN CAN COMPANY,
Defendant;

No. 7279-A

FIDALGO ISLAND PACKING COMPANY,
Defendant;

No. 7280-A

LIBBY, McNEILL & LIBBY, INC.,
Defendant;

No. 7281-A

NAKAT PACKING COMPANY,
Defendant;

No. 7300-A

NEW ENGLAND FISH CO.,
Defendant;

No. 7301-A

P. E. HARRIS COMPANY, INC.,
Defendant;

No. 7302-A

PACIFIC & ARCTIC RAILWAY & NAVIGATION CO.,
Defendant;

No. 7303-A

OCEANIC FISHERIES CO.,
Defendant.

ORDER OF DISMISSAL

In the above-entitled and numbered cases, each of the defendants having filed motion to dismiss plaintiff's complaint, under Rule 12(b) Federal Rules of Civil Procedure; and the cases having been consolidated for the argument and proceedings in connection with the motions; and the questions of law raised by the motions, which are common to all the cases, having been argued before the court on October 28th, 1955, by counsel for all the parties, who thereafter filed briefs in support of their arguments; and the court being fully informed, and having on January 4th, 1956, rendered and filed herein its written opinion, to which reference is made,

It Is Now Therefore Ordered: That the complaints in each of the above-entitled and numbered causes, be and they are hereby dismissed, for the reasons stated in the court's opinion of January 4th, 1956.

Dated at Juneau, Alaska, the 21st day of January, 1956.

/s/ WALTER H. HODGE,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 21st, 1956.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A, 7281-A
7300-A, 7301-A, 7302-A and 7303-A

NOTICE OF APPEAL

Notice is hereby given that the Territory of Alaska, the above-named plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the Order dismissing plaintiff's complaints in the above-numbered civil actions, entered on the 21st day of January, 1956.

Dated at Juneau this 7th day of February, 1956.

/s/ J. GERALD WILLIAMS,
Attorney General;

/s/ HENRY J. CAMAROT,
Assistant Attorney General,
Attorneys for Plaintiff.

[Endorsed]: Filed February 7th, 1956.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A, 7281-A
7300-A, 7301-A, 7302-A and 7303-A

STATEMENT OF POINTS

The points in the above appeal upon which Appellant intends to rely are as follows:

(1) The Court erred in granting the Appellee's Motion to Dismiss the Complaint.

This is error since the Complaint did state a claim upon which relief can be granted, in that Territorial law specifically permits recovery of the real and personal property taxes sought therein.

(2) The Court erred in holding that a personal action would not lie against each of the Appellees for the recovery of the taxes involved.

This is error since Section 12 of Chapter 10, S.L.A., 1949, and other Sections therein, decrees that the "person" is to be "assessed and taxed."

(3) The Court erred in holding that the accrued and unpaid taxes due and owing under Chapter 10, S.L.A., 1949, by the Appellees to the Appellant for the years 1949, 1950, 1951 and 1952 were cancelled and excused by Chapter 22, S.L.A., 1953.

This is error: (a) Since Chapter 22 and the legislative history surrounding the passage of this Act indicates the accrued and unpaid taxes for the years 1949, 1950, 1951 and 1952 were not to be cancelled or excused; and (b) Since the cancellation or excusing of such taxes would create an unjust result as to those taxpayers who in good faith have paid the said tax.

(4) The Court erred in refusing to consider pertinent evidence of legislative history which, if considered, would show the true legislative intent and statutory construction to be placed on Chapter 22, S.L.A., 1953, i. e., that unpaid taxes levied by Chapter 10, S.L.A., 1949, were not intended to be cancelled or excused by the Legislature.

This is error since the rejected evidence would have clearly shown that the legislative intent and intended statutory construction is contrary to the District Court's holding and that the payment of said taxes were not excused by the Legislature.

(5) The Court erred in rejecting the introduction into evidence of both the original House Bill No. 3 and Senate Bill No. 5, Twenty-First Session, Territory of Alaska Legislature.

This is error since the original House Bill and the Senate Bill which by their plain language would have excused the accrued taxes for the specific years involved, were unqualifiedly rejected by both houses and therefore clearly manifest a legislative intent not to excuse the payment of said back taxes.

(6) The Court erred in holding that the Territory's general savings clause (Section 19-1-1 ACLA 1949) is in irreconcilable conflict with the alleged "specific savings clause" of Section 1 of Chapter 22, S.L.A., 1953.

This is error since the Territory's general savings clause and the alleged specific savings clause in Chapter 22 are in complete harmony and easily reconcilable.

(7) The Court erred in holding that the Appellant is without remedy to collect and enforce the taxes accruing to the Appellant under Chapter 10, S.L.A., 1949.

This is error in that: (a) Chapter 10, S.L.A., 1949, expressly authorizes the collection and enforce-

ment of taxes by property foreclosure; and (b) The common law, which is expressly made applicable to Alaska by Territorial statute, authorizes the collection of taxes by appropriate in personam proceedings where the taxpayer is personally liable.

Dated at Juneau, Alaska, this 27th day of February, 1956.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General;

By /s/ EDWARD A. MERDES,
Assistant Attorney General.

Receipt of copy acknowledged.

[Endorsed]: Filed February 27th, 1956.

[Title of District Court and Causes.]

Nos. 7278-A, 7279-A, 7280-A, 7281-A, 7300-A, 7301-A, 7302-A and 7303-A

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all Orders of the Court filed in the above-entitled causes, and constitutes the record on appeal as designated by the Appellant.

In witness whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 13th day of March, 1956.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15070. United States Court of Appeals for the Ninth Circuit. Territory of Alaska, Appellant, vs. American Can Company, Fidalgo Island Packing Company, Libby McNeill & Libby, Inc., Nakat Packing Company, New England Fish Co., P. E. Harris Company, Inc., Pacific & Arctic Railway & Navigation Co., and Oceanic Fisheries Co., Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed March 16th, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 15,070

TERRITORY OF ALASKA,
Plaintiff,

vs.

AMERICAN CAN COMPANY,
Defendant,

FIDALGO ISLAND PACKING COMPANY,
Defendant,

LIBBY, McNEILL & LIBBY, INC.,
Defendant,

NAKAT PACKING COMPANY,
Defendant,

NEW ENGLAND FISH COMPANY,
Defendant,

P. E. HARRIS COMPANY, INC.,
Defendant,

PACIFIC & ARTIC RAILWAY & NAVIGATION COMPANY,
Defendant,

OCEANIC FISHERIES COMPANY,
Defendant,

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Comes now appellant above named and adopts the Designation of Record and Statement of Points to

be relied on by Appellant, filed with the clerk of the district court, as his statement of points and designation to be relied upon in the United States Court of Appeals, and prays that the whole of the record as filed and certified by printed.

Dated at Juneau, Alaska, this 22nd day of March, 1956.

J. GERALD WILLIAMS,
Attorney General;

By /s/ HENRY J. CAMAROT,
Assistant Attorney General,
Attorneys for Appellant.

[Endorsed]: Filed May 23, 1956.

[fol. 77] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—April 24, 1957

(Omitted in printing)

[fol. 78] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT—June 27, 1957

Ordered that the typewritten opinion, and dissenting opinion of Healy, CJ, this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the majority opinion rendered.

[fol. 79] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,070—June 27, 1957

TERRITORY OF ALASKA, Appellant

v.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, MCNEILL & LIBBY, INC., NAKAT PACKING COMPANY, NEW ENGLAND FISH CO., P. E. HARRIS COMPANY, INC., PACIFIC & ARCTIC RAILWAY & NAVIGATION CO., and OCEANIC FISHERIES CO., Appellees

---

Appeal from the District Court for the District of Alaska, Division Number One

---

Before HEALY, LEMMON, and FEE, Circuit Judges.

OPINION—June 27, 1957

LEMMON, Circuit Judge.

In the face of the Alaska Legislature's mandate in 1953 that the Territory's Property Tax Act of 1949 "is hereby

repealed," with certain specific and limited exceptions embodied in a special saving clause clearly not applicable here, the appellant insists that it can still "collect accrued and unpaid taxes for the years 1949, 1950, 1951 and 1952."

It is urged that this saving clause merely bestowed an "important *additional right* in the form of a pecuniary advantage [to] municipalities, schools and public utilities . . . but denied to the Territorial Government"; but that this "alleged special savings [*sic*] clause" should not protect the appellees from being held "personally liable for the unpaid taxes" for the earlier years.

In this connection, we may observe in passing that both parties repeatedly refer in their briefs to "savings" clauses —the appellant 44 times and the appellees 58 times. This [fol. 80] palpable error, in which the Court below joined, and which, because of its frequency, can scarcely be regarded as typographical, occasionally is encountered even in some legal encyclopedias. For example, in 50 Am. Jur., Statutes, § 528, page 535, under the caption *"Express Savings Provisions in Repealing Statutes,"* we find the form "savings" and the form "saving" each used three times in the same paragraph, each time followed by the word "clause."

Since we are here dealing with statutory construction and not with bank accounts, "saving" is, of course, the precise word. See South Carolina v. Gaillard, 1880, 101 U.S. 433, 438; Bridges v. United States, 1953, 346 U.S. 209, 227, note 25; Bouvier, Third Revision, 1914, volume 2, page 3007; 82 C.J.S. Statutes § 440, pages 1014-1018; Webster's New International Dictionary, Second Edition, Unabridged, 1955, page 2223, *sub verbis* "saving clause."

In his argument supporting the finespun thesis that the appellees owe these back taxes in the face of a plain and—as to them—unqualified repeal, able counsel for the appellant displays more agility than persuasiveness.

1. *Statement of the Case*

On February 21, 1949, the Territorial Legislature of Alaska enacted the first general "Property Tax Act" of the Territory, Chapter 10, Session Laws of Alaska, 1949, hereinafter sometimes referred to as Chapter 10.

On March 12, 1953, the Property Tax Act was repealed by Chapter 22, Session Laws of Alaska, 1953, pages 73-74, which was passed over Governor Ernest Gruening's veto. Because of the crucial relevance of that repealing statute to the present lawsuit, we copy it below in full:

"To repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949; *excepting from repeal certain taxes and tax exemptions;* and declaring an emergency.

"Be it enacted by the Legislature of the Territory of Alaska:

"Section 1. That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed.

[fol. 81] "Section 2. Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) any exemptions from the taxes referred to in subsection (a) of this section, which have been granted under the provisions of Section 6(h) of Chapter 10, Session Laws of Alaska 1949.

"Section 3. An emergency is hereby declared to exist and this Act shall be in full force and effect for and after the date of its passage and approval." [Emphasis supplied.]

It may here be explained that Section 6(h) of Chapter 10, *supra*, refers to "incentive exemptions" that the Tax Commissioner of Alaska was authorized to grant to "new industries," and is not relevant to the present controversy.

Between April and May of 1955, the appellant filed eight separate complaints against the appellees seeking to recover

a total of more than $175,000 in taxes, interest and penalties for various years between 1949 and 1952, inclusive. The appellees point out that these suits "were all personal actions against the several [appellees] seeking to recover taxes on both real and personal property combined without any attempt at segregation of one type of property from the other."

Each appellee filed a separate and identical motion to dismiss, alleging that the complaint did not state a claim upon which relief could be granted, and that the action was not brought within the time required by law.

On May 5, 1955, the appellant filed a counter motion to strike against four of the appellees, requesting the Court below to strike the motion to dismiss. The Court denied the motion to strike and granted the appellees' motion to dismiss the eight complaints, for the reasons stated in the Court's opinion, which was filed on January 4, 1956. 137 F. Supp. 181.

[fol. 82] On February 7, 1956, the appellant filed a notice of appeal from the order of the Court below dismissing the complaints. On November 14, 1956, we ordered that the appeal "be dismissed for want of jurisdiction because of the lack of final judgment," and we remanded the cases to the Court below.

On December 11, 1956, the District Court filed a final judgment decreeing (1) that the complaints alleging a personal liability be dismissed; (2) that the complaints and the "numbered causes be dismissed on the merits for the reasons stated in the Court's opinion of January 4, 1956," *supra;* and (3) that neither the taxes nor the remedy under Chapter 10 "survived the repeal found in Chapter 22 SLA 1953," etc.

On the same day, a second notice of appeal was filed in this case. It is this second appeal that is now before us.

Four questions are presented by the appellant:

(1) Whether the Property Tax Act is a tax on the appellees for which they are personally liable, or is merely a tax upon their property;

(2) Whether the appellant is without a remedy to collect and enforce taxes due under the Property Tax Act;

(3) Whether the language in Chapter 22, *supra*, repealing the Property Tax Act, is a "special saving clause" nullifying the appellant's right under the "Territorial *General* Saving Clause," *infra*, "to collect accrued and unpaid taxes for" 1949-1952.

(4) Whether, in interpreting Chapter 22, *supra*, the terms and expression of which are asserted to be ambiguous, "the Court is limited in ascertaining the legislative intent to only those statutory constructional aids of which it may take 'judicial notice' or whether it may refer to extrinsic aids, otherwise admissible under the laws of evidence, which bear directly on such intent."

In our view, Question No. 3 is determinative of the issue.

2. *Alaska's General Saving Statute*

Section 19-1-1, Alaska Compiled Laws Annotated, 1949, as amended by Chapter 4, Extraordinary Session Laws of Alaska, 1955, reads as follows:

> [fol. 83] "*Effect of repeals or amendments.* The repeal or amendment of any statute shall not affect an offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made. When any act repealing a former act, section or provision shall be itself repealed, such repeal shall not be construed to revive such former act, section, or provision, unless it shall be expressly so provided."

3. *The Saving Section of the Repealing Act Overrides the General Saving Statute.*

Section 2 of the Act of 1953, hereinafter the repealing act, must prevail over Section 19-1-1 of Alaska Compiled Statutes Annotated, hereinafter the general saving statute.

At the outset, we note that the very title of the repealing act underlines one of its main purposes; namely, that of *"excepting from repeal certain taxes and tax exemptions."*

In John J. Sesnon Co. v. United States, 9 Cir., 1910, 182 F. 573, 576, certiorari denied, 1911, 220 U.S. 609, a case that came to this Court from Alaska, Judge Morrow observed:

> "Where doubt exists as to the meaning of the statute, the title may be looked to for aid in its construction."

In the repealing statute before us, the participial phrase, *"excepting* from repeal" certain taxes, etc., without any qualification to the word "excepting," indicates that the term is to be taken in its ordinary restrictive sense.

Considering the repealing act as a whole, we should bear in mind that being a *special* or, in the words of the Supreme Court, a *"specific"* enactment, it qualifies and furnishes [fol. 84] exceptions to the *general* repeal law of Alaska—Section 19-1-1, dealing with the "Effect of repeals or amendments," *supra.*

More than threescore and ten years ago, this rule was already "well settled" in Anglo-American law.

In Townsend v. Little, 1883, 109 U.S. 504, 512, the Court observed:

> "According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, *the specific qualifying and supplying exceptions to the general,* this provision for the execution of a *particular* class of deeds is *not* controlled by the law of the territory requiring deeds *generally* to be executed with two witnesses. [American and English authorities cited.]" [Emphasis supplied.]

The principle is merely a corollary of the familiar maxim, *Expressio unius est exclusio alterius*, as was pointed out in Rybolt v. Jarrett, 4 Cir., 1940, 112 F.2d 642, 645:

> "There is some force here in the maxim Expressio unius est exclusio alterius. When in a statute of such clean cut restrictive force, the legislature undertook to make certain explicit exceptions, it seems a fair implication that the legislature intended to exclude other exceptions, and thus to make the statute say what it means and mean what it says."

Similarly, in Jones v. H.D. & J.K. Crosswell, 4 Cir., 1932, 60 F.2d 827, 828, it was said:

> "Being exceptions carved out of the general rule, intangible property not *specifically* mentioned as being tangible property must be excluded. The maxim 'expressio unius est exclusio alterius' applies. *It is a well-settled principle of statutory construction that the expression of one thing excludes others not expressed.* [Many cases cited.]" [Emphasis supplied.]

The principle is well established in California. In Los Angeles Brewing Company v. City of Los Angeles, 1935, [fol. 85] 8 C.A. 2d, 391, 398, cited in the *Stanford Law Review* of January, 1949, Volume 1, Number 2, Page 371, Note 2, the Court remarked:

> "As section 22 or Article XX [of the Constitution of California] *was adopted last, as it is special in dealing with this subject of the control, licensing and regulating of 'the manufacture, sale, purchase, possession, transportation and disposition of intoxicating liquor within the state'* and as it shows an intention to remove the licensing for revenue of those so dealing in intoxicating liquors from the realm of a municipal affair to that of a matter of general state-wide concern, its provisions must be held to control over those of section 6 of article XI of the Constitution [authorizing cities and towns to legislate "in respect to municipal affairs"] and vest in the state the exclusive and sole right to license for

> the purpose of revenue those engaged in the business of manufacturing, dealing in or handling intoxicating liquors." [Emphasis supplied.]

So far we have looked at the authorities dealing with the *general* application of the principle of "The expression of one is the exclusion of others." But there is a leading and oft-quoted decision that applies the venerable maxim to the precise question that we are here considering; namely, the conflict between a *general* repeal provision and a *special* repeal provision.

We refer to State v. Showers, 1885, 34 Kan. 269, 8 P. 474, 476-477, where the entire question was lucidly discussed:

> "The offense of which the defendant was found guilty was committed in violation of section 7 of the prohibitory liquor law as enacted in 1881, and the prosecution for such offense was commenced and conducted to its final termination after said section had been amended and the original section repealed by an act taking effect March 10, 1885; and the first question presented to this court, . . . is whether the defendant could be punished for a violation of the old section when the prosecution had not been commenced until after it had been amended and repealed." [Page 475]

The general saving statute of Kansas at that time read in part as follows:

> [fol. 86] "The repeal of a statute does not revive a statute previously repealed, nor does such repeal effect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed." (Compiled Laws, 1879, c. 104, § 1)

It will be observed that the above Kansas statute was closely similar in effect to the General Saving Act of Alaska, § 19-1-1, *supra*. On the other hand, § 19 of the repealing act of 1885, *supra*, contained the following special *saving* proviso:

"All prosecutions pending at the time of the taking effect of this act shall be continued the same as if this act had not been passed."

With this legislative and factual situation before it, the Supreme Court of Kansas said:

"The question as to what should be repealed and what saved was before the legislature. They had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. *Expressio unius est exclusio alterius.* The legislature evidently intended that the special saving clause which they enacted in section 19 of the Act of 1885 should take the place of all others, so far as prosecutions under original section 7 were concerned; and *that in cases where the special saving clause could apply the general saving statute should have no operation.* 'It is a well-settled rule of construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it.' *Felt* v. *Felt,* 19 Wis. 196. 'It is familiar law that a later statute will operate as a repeal of a former, although it contains no express repeal, and even though its provisions are not absolutely repugnant to those of the former, whenever it is obvious that the [fol. 87] one was intended as a substitute for the other.' [Cases cited.]

"If, however, the saving clause in section 19 of the act of 1885 was not intended by the legislature to cover the entire ground, and to be a substitute for the general saving statute so far as cases like this are concerned, then the saving clause contained in section 19 of the Act of 1885 has no office to perform, but is absolutely worthless, for the general saving clause would save all

that it saves and very much more. Such an interpretation of the law as this would violate all proper canons of construction. It would in effect say that the legislature had done the very foolish thing of enacting a saving clause which can have no real operation at all, and can subserve no actual purpose whatever. 'It is a well-settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance, which is altogether inadmissible.' *Ellis* v. *Paige*, 18 Mass. 45." [Emphasis supplied.]

Emphasizing that the *general* saving statute comes into play only where the repealing act is "silent as to whether the rights and remedies" under the old law are to be saved, the Supreme Court of Kansas said in conclusion:

"The theory upon which it has been held by this court that the general saving statute is applicable in cases of repeals is that where the repealing statute is *silent* as to whether the rights and remedies which had previously accrued under the repealed statute should be saved or not, such silence indicates an intention on the part of the legislature that the general saving statute should be left to operate upon the repeal, and to save all such rights and remedies as come within the saving provisions of the general saving statute. [Case cited.] In the present case, however, the repealing statute is not *silent*, for it itself contains a saving clause which shows that it was not the intention of the legislature to rely upon the general saving statute. [fol. 88] "For the reasons above stated we think the present action cannot be maintained. The judgment of the court below will therefore be reversed and cause remanded for further proceedings.

"(All the justices concurring.)" [Pages 477-478][1]

[1] See also, on this question of the legislators' intention "that nothing should be saved except what they expressly stated should be

Both on reason and authority, therefore, we hold that § 2 of Chapter 22 of 1953, the repealing statute, means precisely what it says; namely, that Chapter 10 of the Session Laws of Alaska, 1949, shall "be and it is hereby repealed," except "any taxes which have been levied and assessed by any municipality, school or public utility district," etc., including such taxes levied and assessed for the "current fiscal year"—taxes which are not in controversy here, and which alone are saved from repeal.

With the above exclusive exception, Chapter 10, Session Laws of Alaska, 1949, is no longer of any force or effect—as to past, present, or future years.

4. *The District Court Did Not Err in Excluding from Evidence H. B. No. 3 and S. B. No. 5.*

The appellant asserts that "Because of the ambiguity of the statute and the direct bearing on the legislative intent, the Court should have considered the bill originally introduced and the amendments thereto, which preceded the final adoption of Chapter 22, SLA 1953".

Specifically, the appellant urges as error the lower court's rejection of "both the original House Bill No. 3 and Senate Bill No. 5, Twenty-first Session, Territory of Alaska Legislature".

The record shows that only House Bill No. 3 was offered in evidence. The appellant counters with the statements that Senate Bill No. 5 "was identical in all respects to House Bill No. 3"; that an authenticated copy was formally filed [fol. 89] in the District Court with the Territory's brief; and, "alternatively", that the Senate bill "could have been called to the Court's attention by citing page 32 of the 1949 Senate Journal (which is conceded by the appellees to be subject to judicial notice) wherein the word-for-word likeness of the *title* of Senate Bill No. 5 and House Bill No. 3 clearly indicates both bills to be indistinguishable in form, design or purpose".

---

saved", Wilmington Trust Co. v. United States, Del., 1928, 28 F.2d 205, 208; and on the general application of the "expressio unius" maxim, see also Ainsworth v. Bryant, 1949, 34 C.2d 465, 472, 473, 211 P.2d 564, 568; 50 Am. Jur. §528, page 535; 82 C.J.S. §440(a), page 1015.

We accept the appellant's "alternative" point at its face value, and hold that the title of the Senate bill and the House bill indicate that they are "indistinguishable". By a parity of reasoning, however, we also hold that the title of House Bill No. 3 as introduced and the title of the House bill as enacted "clearly indicate" their differences.

As originally introduced, the bill, according to its title, was offered for the purpose of abrogating and repealing all accrued and unpaid taxes levied thereunder"; while the Act as passed carried a title showing that the new statute was "excepting from repeal certain taxes and tax exemptions". The extract from the Senate Journal printed in the appendix to the appellant's opening brief in this Court also shows that a "new Section 2" dealing with taxes levied "by any municipality, school or public utility district", etc., *supra*, was added by the Senate, and was concurred in by the House.

These changes in the House bill before its final enactment, however, are not relevant here.

In Trailmobile Co. v. Whirls, 1947, 331 U.S. 40, 60-61, the Supreme Court thus disposed of attempts to interpret statutes by minutely tracing "legislative maneuvers":

> "These reasons, founded in the literal construction of the statute and the policy clearly evident on its face, are sufficient for disposition of the case. They are not weakened by the Government's strained and unconvincing citation of the Act's legislative history.
>
> "That argument is grounded in conclusions drawn from changes made without explanation in committee [as in the statute before us] with respect to various provisions finally taking form in §8, changes affecting, [fol. 90] bills which eventually became the Selective Training Service Act and the National Guard Act, 54 Stat. 858. Apart from the inconclusive character of the history, the Government's contention assumes that the only alternatives presented by the final form of the bill were indefinite duration for the incidents of the employment named and none at all. This ignores the other possibilities considered in this opinion, including duration for a reasonable time. Moreover, as has been noted, *the most important committee changes relied*

upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers." [Emphasis supplied.]

We hold that the trial court did not commit prejudicial error in excluding evidence of the original House Bill No. 3 and the amendments thereto.

From the foregoing, it will be seen that, since the limited saving clause did not preserve enough of the repealed tax statutes to be applicable against the taxpayers who are the appellees here, they are not liable either *in rem* or *in personam*. Any discussion, therefore, of the *personal* liability of the appellees, as contradistinguished from the *in rem* liability of their property, would be moot.

In our view, the appellees are not liable either *in rem* or *in personam*, since the repealing act, as has been shown, completely wiped out *any* tax liability except as to municipal, school, or public utility district taxes, which are concededly not involved in the instant case.

5. *Conclusion*

Accordingly, it is the holding of this Court that the saving section of the repealing act relating to the Alaska Property Tax Law overrides the general saving statute; and that the Court below did not err in excluding from evidence House Bill No. 3 and Senate Bill No. 5.

The judgment of the District Court is therefore

Affirmed.

[fol. 91] HEALY, Circuit Judge, Dissenting

I disagree with the holding of the majority that section 2(a) of chapter 22, Alaska Session Laws of 1953, nullifies the effect here of the Alaska General Savings Statute, section 19-1-1, Alaska Compiled Laws 1949. The relevant provisions of the latter are quoted below.[1] It is not at all clear

[1] "Effect of repeals or amendments. The repeal or amendment of any statute shall not affect an offense committed or any act done

that it was the legislative intent to wipe out the liability of those in the situation of appellees for unpaid taxes levied for the years 1949 through 1952, but rather that section 2(a) had another and different purpose.

Significantly, the history of the 1953 legislation shows that section 2 of the original bill was deleted in the course of the bill's consideration. That section in unmistakable terms had forgiven and abrogated all pre-1953 taxes. Concurrently, the phrase "and abrogating and repealing all accrued and unpaid taxes levied thereunder" was deleted from the bill's title. Thus the legislature had before it in the original bill clear language which would have forgiven the taxes here in question. It chose, instead, to reject the language.

In material part section 2(a) of the Act as finally passed reads:

> "Section 2. Section 1 of this Act shall not be applicable to: (a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; . . ."

In light of what has been said above, the section is fairly construable as intending no more than a grant to the munic- [fol. 92] ipalities and school and public utility districts—but not to the Territory itself—of the right to levy and collect taxes for the then current year, namely 1953, both before and after the repealing act had taken effect. There was a logical reason for granting this right to these local

---

or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made. . . ."

districts in that the legislature may well have felt it undesirable to interfere with their current fiscal programs, whether or not the levies for that year had yet been made. As so construed, section 2(a) is readable in para materia with the General Savings Statute, above quoted, as not interfering with the collection of unpaid 1949-1952 taxes, either of the Territory or of the taxing districts.

As was recognized by the trial judge but is not mentioned in the majority opinion here, it is a fundamental rule of statutory construction that general savings clauses or statutes preserve rights and liabilities which have accrued under an act repealed, and that they operate to make applicable in designated situations the law as it existed before the repeal, *unless such application is negatived by the express terms or clear implication of a particular repealing act.*

My brothers, as I understand them, do not contend that such application is negatived by the express terms of the 1953 legislation, but rather is to be gathered by implication. To me, however, the legislation in the respects here in question is fundamentally ambiguous, both in its meaning and in the motives inspiring its enactment. Accordingly I dissent from the majority holding.

[File endorsement omitted]

[fol. 93] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15070

TERRITORY OF ALASKA, Appellant,

v.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, MCNEILL & LIBBY, INC., NAKAT PACKING COMPANY, NEW ENGLAND FISH CO., P. E. HARRIS COMPANY, INC., PACIFIC & ARCTIC RAILWAY & NAVIGATION CO., and OCEANIC FISHERIES CO., Appellees.

JUDGMENT—Entered June 27, 1957

Appeal from the District Court for the District of Alaska, Division Number One.

This cause came on to be heard from the District Court for the District of Alaska, Division Number One, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted]

[fol. 94] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,070

[Title omitted]

Appeal from the District Court for the District of Alaska, Division Number One.

APPELLANT'S PETITION FOR A REHEARING—Filed July 25, 1957

To the Honorable William Healy, Dal M. Lemmon, James Alger Fee, Judges of the United States Court of Appeals for the Ninth Circuit, who constituted the Court in the original hearing:

Petitioner Territory of Alaska prays that this Court grant rehearing of its judgment of June 27, 1957, holding [fol. 95] that the repealing statute, Chapter 22, SLA 1953, completely wiped out any tax liability of the appellees herein and any other person who failed or refused to pay taxes imposed by Alaska's General Property Tax Act, Chapter 10, SLA 1949.

The reasons for granting rehearing in this cause are as follows:

(1) *Chapter 22, SLA 1953, as construed by the majority opinion, violates the uniformity clause of the Organic Act and the Equal Protection Clause of the Constitution.*

The majority's construction of Chapter 22, SLA 1953, which imputes to the Territorial Legislature an intent to forgive taxes lawfully imposed by Chapter 10, SLA 1949, while at the same time impliedly ruling that those taxpayers who complied with the law are subject to full tax liability, means that Chapter 22, as so interpreted, violates the uniformity clause of Alaska's Organic Act and the Equal Protection Clause of the United States Constitution.

(2) *The majority's construction of Chapter 22 results in an unfair and unjust consequence[1] never intended by the Legislature.*

---

[1] 50 Am. Jur., *Statutes*, Section 368:

"The results which will follow one construction or another of a statute is often a potent factor in its interpretation. • • • Indeed, there are cases in which the consequences of a particular construction are, in and of themselves, conclusive as to the correct solution of the question. In any event, it is generally regarded as permissible to consider the consequences of a proposed interpretation of a statute, where the act is ambiguous in terms and fairly susceptible of two constructions. Where the language of a statute is doubtful and the necessity for construction arises, the court may consider whether the legislature could have intended a construction that would be highly injurious, rather than one beneficial and harmless. Under such circumstances, it is presumed that undesirable consequences were not intended; to the contrary, it is presumed that the statute was intended to have the most beneficial operation that the language permits. It is accordingly a reasonable and safe rule of construction to resolve any ambiguity in a statute in favor of a beneficial operation of the law, and a construction of which the statute is fairly susceptible, is favored, which will avoid all objectionable, mischievous, indefensible, wrongful, evil, and injurious consequences. • • • •"

Sutherland on Statutory Construction, 3rd Ed., Vol. 3, Sec. 6006, p. 149:

"• • • A restricted interpretation is usually applied where the effect of a literal interpretation will make for injustice and absurdity, or, in the words of one court, the language must be so unreasonable 'as to shock general common sense.'"

[fol. 96] Since Chapter 22, SLA 1953, as Judge Healy pointed out, is fundamentally ambiguous both in its meaning and the motives inspiring its enactment, the construction given it by this Court contravenes a well-established canon of statutory construction, namely, that where a statute is ambiguous in terms and fairly susceptible of two constructions, the injustice which may follow one construction or the other may properly be considered. And it is the duty of the Courts to render that interpretation as will best subserve the ends of justice. It is therefore a reasonable and safe rule of construction to resolve an ambiguity in favor of that interpretation which will result in a fair application of the statute.[2]

[fol. 97] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING —December 4, 1957

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed July 25, 1957, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

---

[2] 50 Am. Jur., *Statutes*, Sec. 370, p. 376.

[fol. 99] IN SUPREME COURT OF THE UNITED STATES

No. 833, October Term, 1957

TERRITORY OF ALASKA, Petitioner,

v.

AMERICAN CAN COMPANY, FIDALGO ISLAND PACKING COMPANY, LIBBY, MCNEILL & LIBBY, INC., ET AL.

ORDER ALLOWING CERTIORARI—April 7, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Harlin took no part in the consideration or decision of this application.